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# The Poverty Law Education of Charles Reich

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## THE POVERTY LAW EDUCATION OF CHARLES REICH

*Felicia Kornbluh and Karen M. Tani\**

As scholars of social welfare law and policy, when we think about Charles Reich, we think first of welfare rights and poverty law. In the 1960s, his theoretical contributions were among those that led to the creation of the field of poverty law. His work also reached thinkers and organizers outside law schools, who built on his theories to create campaigns to reform public assistance and to demand a serious reduction in economic inequality in what was then called the “affluent society.” Particularly noteworthy contributions include *The New Property* (1964)<sup>1</sup>—famously invoked in the 1970 Supreme Court case *Goldberg v. Kelly*;<sup>2</sup> also *Midnight Welfare Searches and the Social Security Act*, published in 1963, and *Individual Rights and Social Welfare: The Emerging Legal Issues*, published two years later.<sup>3</sup>

But if many people have recognized Reich’s contribution to poverty law, few have paused to ask how it came to be. How did Reich, with his relatively privileged upbringing and elite education, come to learn about the legal and bureaucratic difficulties of welfare recipients? Having gone straight from the upper echelons of legal

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<sup>1</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>2</sup> 397 U.S. 254, 262 (1970).

<sup>3</sup> Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963) [hereinafter Reich, *Midnight Welfare Searches*]; Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) [hereinafter Reich, *Individual Rights and Social Welfare*].

practice to a professorship at Yale Law School,<sup>4</sup> when would he have had time to educate himself about matters that were then left out of the law school curriculum and even most *pro bono* practice?

Other themes in Reich's work connect more obviously to his personal biography. His positionality as a Jewish, gay, man, closeted until well into adulthood, clearly informed his concerns about government surveillance and persecution.<sup>5</sup> Similarly, one needs only recall the timing of his entry into the legal profession—at the tail end of a period of government obsession with left-wing subversion<sup>6</sup>—to understand how he had come to think so deeply about the value of government-issued licenses, passports, and clearances (all examples of what he called “new property”). When Reich was in law school in the early 1950s, students who shared his left-of-center political views worried about whether state committees on “character and fitness” would allow them to practice law.<sup>7</sup> Government withdrawals of such benefits had become commonplace. A challenge to one such withdrawal (of a medical license) was, for Reich, the most important matter he worked on during his year clerking for Justice Hugo Black.<sup>8</sup> But again, welfare recipients and others in economic privation had no obvious connection to his life. How did he gain the knowledge necessary to write so insightfully about their troubles?

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<sup>4</sup> Roger D. Citron, *Charles Reich's Journey from the Yale Law Journal to the New York Times Best-Seller List: The Personal History of The Greening of America*, 52 N.Y.L. SCH. L. REV. 387, 394-96 (2008).

<sup>5</sup> CHARLES A. REICH, *THE SORCERER OF BOLINAS REEF* (1976); Interview by Felicia Kornbluh with Charles A. Reich, in San Francisco, Cal. (Jan. 10, 2002) (transcript on file with Felicia Kornbluh); Sarah A. Seo, *The New Public*, 125 YALE L.J. 1548 (2016).

<sup>6</sup> See ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA*, at xvii (1998) (describing this period as lasting from the late 1940s through the 1950s, but starting to “peter out” in November 1954, with the censure of Wisconsin Senator Joseph McCarthy).

<sup>7</sup> Charles A. Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223, 234 (1989).

<sup>8</sup> See *id.* at 234-35 (discussing the personal significance of *Barsky v. Board of Regents*, 347 U.S. 442 (1954)); Interview by Felicia Kornbluh with Charles A. Reich, *supra* note 5; see also Citron, *supra* note 4, at 393-94 (further documenting the importance to Reich of the *Barsky* case); Karen M. Tani, *Flemming v. Nestor: Anti-communism, the Welfare State, and the Making of “New Property,”* 26 L. & HIST. REV. 379, 405-07 (2008) (describing the influence on Reich of other cases that fit the same pattern).

Building on the work of law professor Martha Davis,<sup>9</sup> and drawing on our own primary source research, we find the answer in two older women in Reich's life, both deeply enmeshed in the worlds of social welfare and public income support: Justine Wise Polier, the famous New York family court judge and the mother of one of Reich's childhood friends, and Elizabeth Wickenden, a close friend of Polier's and a well-known figure in the world of New Deal policymaking. What Reich learned from these women, and the ways they appreciated and shared his research, decisively affected his research agenda in ways that continue to ripple through law and legal scholarship.

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Justine Wise Polier was a daughter of New York City Jewish Progressive royalty. Her father, Rabbi Stephen Wise, was the leading Reform rabbi in the United States. When offered a position at the city's most elite synagogue, he instead founded an alternative, the Free Synagogue, which had free seating and no fixed dues, and allowed women to be members and leaders.<sup>10</sup> He used his position to advocate for workers, immigrants, and poor people. He also led a rich associational and political life, helping to reorganize and then lead the American Jewish Congress and participating in the founding of both the National Association for the Advancement of Colored People ("NAACP") and the American Civil Liberties Union ("ACLU"). Rabbi Wise cultivated a close relationship with Franklin Delano Roosevelt, among others.<sup>11</sup> Justine Wise Polier's mother, Louise Waterman Wise, was a prominent social reformer in her own right, known for her work with Jewish refugees and orphans. The result, for Polier, was an upbringing studded with famous Progressive figures: Secretary of Agriculture Henry Wallace arrives for lunch; the influential black educator and intellectual Booker T. Washington appears for dinner; former President William Howard Taft reads to her while she recovers from the chicken pox.<sup>12</sup>

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<sup>9</sup> MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973*, at 82-85 (1993).

<sup>10</sup> JONATHAN SARNA, *AMERICAN JUDAISM: A HISTORY* loc 2726 (2014) (ebook).

<sup>11</sup> *Id.* at loc 3444-48.

<sup>12</sup> *Reminiscences of Justine Wise Polier* (1981), Oral History Archives at Columbia, Rare Book & Manuscript Library, Columbia University, N.Y. [hereinafter *Reminiscences*].

As Polier transitioned into adulthood, she continued to pair political education with more traditional classroom pursuits. Her undergraduate coursework at Radcliffe and Barnard, for instance, occurred alongside work at settlement houses and efforts to embed herself in factories. She spent a summer at the United Nation's International Labor Organization, studying up on trade unions.<sup>13</sup> Barely out of college, she had been flagged as a potential subversive. When she started law school—at Yale, in 1925—it was only because her father gently suggested that she learn some law if she was going to continue getting into trouble. She went on to excel at Yale, despite spending much of her time in Passaic, New Jersey, supporting a major textile workers strike.<sup>14</sup>

After graduation, on the eve of the Great Depression, Polier turned to social legislation. She became a “New Deal lawyer,” in effect, only based in New York rather than Washington, D.C.<sup>15</sup> From 1929 to 1934, she worked as a referee in the Workmen's Compensation Division of the New York State Department of Labor (headed until 1933 by Frances Perkins, who became FDR's Labor Secretary and the first woman cabinet member). It was a position that had previously gone to political hacks but that Polier took seriously and used as a platform to call for reform. As the Great Depression deepened, she accepted a position with the New York City Mayor's Committee on Unemployment Relief. And in 1935, she began working formally

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<sup>13</sup> *Id.* On the work and politics of the International Labor Organization, see EILEEN BORIS, MAKING THE WOMAN WORKER: PRECARIOUS LABOR AND THE FIGHT FOR GLOBAL STANDARDS, 1919-2019 (2019).

<sup>14</sup> Reminiscences, *supra* note 12. During her time at Yale Law Polier also met her first husband, Professor Leon Tulin. He died of leukemia in 1932. Joyce Antler, *Justine Wise Polier*, *The Encyclopedia of Jewish Women: A Comprehensive Historical Encyclopedia*, JEWISH WOMEN'S ARCHIVE (Mar. 20, 2009), <https://jwa.org/encyclopedia/article/polier-justine-wise>.

<sup>15</sup> On New Deal lawyers, see PETER IRONS, THE NEW DEAL LAWYERS (1982); Michele Landis Dauber, *New Deal Lawyers*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (2008); DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940 (2014). On women New Deal lawyers in particular, see Karen M. Tani, *Portia's Deal*, 87 CHI.-KENT L. REV. 549 (2012). On the close relationship between New York's response to the Great Depression and that of national policymakers, see MASON B. WILLIAMS, CITY OF AMBITION: FDR, LA GUARDIA, AND THE MAKING OF MODERN NEW YORK (2013).

for the city in an assistant corporation counsel position that enmeshed her in the implementation of emergency relief programs.<sup>16</sup>

It was the next phase of her career, however, that gave Polier the greatest insights into the public welfare system and the experiences of poor women and children. In 1936, Mayor LaGuardia appointed her to New York City's domestic relations court (commonly known as "family court"), making her the first woman in the state to hold a judgeship above the magistrate level.<sup>17</sup> She remained on the bench almost continuously until 1973.<sup>18</sup>

She would later recount how "horrified" that work left her, as she saw what "happened to people: in the welfare system, the school system, the hospitals system, the state institution system . . ."<sup>19</sup> She was especially disturbed by the way these systems disadvantaged the City's African American and Puerto Rican residents. Her best-known decisions, such as the education case *In re Skipwith*, emphasized the importance of public programs and services while also exposing fundamental, often discriminatory, failures in administration.<sup>20</sup>

Complementing Polier's work on the court and giving her a wider-angled lens on the problems she saw were the relationships she had cultivated with leading civil rights and civil liberties advocates—Thurgood Marshall and Eleanor Holmes Norton, for example, and, of course, her second husband and collaborator, Shad Polier.<sup>21</sup> A lesser-

<sup>16</sup> Reminiscences, *supra* note 12.

<sup>17</sup> On the symbolic and strategic significance of Polier's appointment to the family court bench, see Elizabeth D. Katz, "Racial and Religious Democracy": *Identity and Equality in Midcentury Courts*, 72 STAN. L. REV. 1467 (2020).

<sup>18</sup> She took a brief leave of absence during World War Two to work for the Office for Civilian Defense. Antler, *supra* note 14.

<sup>19</sup> Reminiscences, *supra* note 12.

<sup>20</sup> 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. N.Y. Cnty. 1958); Jennifer de Forest, *Tilting at Windmills? Judge Justine Wise Polier and a History of Justice and Education in New York City*, 49 HIST. OF ED. Q. 68, 84 (2009) (detailing how, with Polier's blessing, this truancy case became "a trial of systemic inequities in the city's schools"). For examples of Polier's first-person writing about what she witnessed as a family court judge, see JUSTINE WISE POLIER, EVERYONE'S CHILDREN, NO ONE'S CHILD (1941); Justine Wise Polier, *A Day in the Children's Court—As One Judge Sees It*, 12 FED. PROBATION 3 (1948); JUSTINE WISE POLIER, A VIEW FROM THE BENCH: THE JUVENILE COURT (1964).

<sup>21</sup> Ellen Herman, *The Difference that Difference Makes: Justine Wise Polier and Religious Matching in Twentieth-Century Adoption*, 10 RELIG. & AM. CULT. 57, 61 (2000).

known figure now, attorney Shad Polier was a prominent civil rights advocate in his day. Notably, he founded and led the Commission on Law and Social Action of the American Jewish Congress, which played a crucial role in fighting for African American and Jewish civil rights after World War Two.<sup>22</sup> Such connections helped ensure that Justine Wise Polier never lost sight of the constitutional dimensions of the supposedly private and domestic troubles she saw in her courtroom.

Reich would have come to know the Poliers in the late 1930s or early 1940s, through one of their sons. By the time Reich was twelve, he told Martha Davis, he and Justine Wise Polier “would debate current events as if I was an adult.”<sup>23</sup> This friendship would eventually open the door to other friendships, including with public welfare expert Elizabeth Wickenden.

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Like many things that informed the New Deal, Elizabeth Wickenden was born in Madison, Wisconsin. She and her family relocated not long after, as her engineering professor father moved up in the world, but something of Wisconsin’s Progressive and social-scientific ethos stuck with Wickenden. She majored in economics and sociology at Vassar College, then went on to various posts in the New Deal administration, first in Harry Hopkins’s Federal Emergency Relief Administration, then in the Works Progress Administration and the National Youth Administration.<sup>24</sup>

Some of the friendships and connections she cultivated in those years would later put her on the radar of the government’s loyalty-security apparatus, as was the case for many New Dealers.<sup>25</sup> But other relationships made her powerful for decades to come. For in-

<sup>22</sup> *Shad Polier, Lawyer, Dead; Active in Civil Rights Cases*, N.Y. TIMES, July 1, 1976; CHERYL LYNN GREENBERG, TROUBLING THE WATERS: BLACK-JEWISH RELATIONS IN THE AMERICAN CENTURY 114-16, 123-38 (2006); AMERICAN JEWISH CONGRESS, THE WORK OF THE COMMISSION ON LAW AND SOCIAL ACTION: A BIBLIOGRAPHY OF REPRESENTATIVE PUBLICATIONS 6 (1957).

<sup>23</sup> DAVIS, *supra* note 9, at 82.

<sup>24</sup> For basic biographical information, see *Finding Aid, Elizabeth Wickenden Papers, 1885-2001 (bulk 1932-1989)*, Wisconsin Historical Society, Madison, Wis., <http://digital.library.wisc.edu/1711.dl/wiarchives.uw-whs-mss00800> (last visited Apr. 14, 2020).

<sup>25</sup> See LANDON R. Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT (2012) (documenting how loyalty-security inquiries plagued government officials on the political left during the 1940s and 1950s, especially people who had played prominent roles in New Deal administration).



stance, she and her husband Arthur Goldschmidt grew close to future Supreme Court justice Abe Fortas and his wife, Carol. She also befriended future president Lyndon Johnson.<sup>26</sup> Later, as she transitioned to a career as a Washington-based consultant to various social welfare groups, Wickenden developed close relationships with high-ranking administrators in the federal Social Security Administration, such as Wilbur Cohen and Arthur Altmeyer. By the 1950s, she was in regular correspondence with Cohen and Altmeyer about how to protect and expand the best aspects of the New Deal's social welfare apparatus, with the ultimate goal of universal protection against what she saw as universally shared risks.<sup>27</sup>

It was in fact these contacts with top federal administrators that first got her thinking about the legal and constitutional rights of welfare recipients—and that inspired her conversations with Charles Reich.

To set the stage, let us offer a brief primer on the U.S. welfare state in the 1950s and early 1960s. Those were good years for some New Deal social welfare programs, such as the increasingly popular Old-Age Insurance program that we now call “Social Security,” and for such new programs as Social Security Disability Insurance.<sup>28</sup> But they were hard years for others, and for one program in particular. Discontent was brewing over the federally subsidized, state-administered program of need-based income support for mothers and

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<sup>26</sup> *Id.*

<sup>27</sup> On Wickenden's Washington-based work and her frequent correspondence with Altmeyer and Cohen, see *Finding Aid*, *supra* note 24; see also KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 216–17, 222 (2016). On the immense power that Cohen and Altmeyer wielded, spanning multiple administrations, see EDWARD D. BERKOWITZ, MR. SOCIAL SECURITY: THE LIFE OF WILBUR J. COHEN (1995). On Wickenden's understanding of social risk and the need for social protection, see Elizabeth Wickenden, *Social Welfare Law: The Concept of Risk and Entitlement*, 43 U. DET. L.J. 517 (1966).

<sup>28</sup> On how and why Old-Age Insurance thrived in years after World War Two, see DANIEL BELAND, SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE (2005). For discussions of disability policy between the New Deal and the 1960s, see Felicia Kornbluh, *Disability, Anti-Professionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s*, 97 J. AM. HIST. 1023 (2011); EDWARD BERKOWITZ, DISABLED POLICY: AMERICA'S PROGRAMS FOR THE HANDICAPPED (1987).



children, also known as Aid to Dependent Children (“ADC”), or “welfare,” in popular parlance.<sup>29</sup>

This program grew out of state-level Progressive Era mothers’ pensions, programs designed primarily for white women who had been properly married and then widowed or abandoned by their male breadwinners, leaving them alone with young children.<sup>30</sup> When the federal government began subsidizing these scattered state programs in 1935, they technically became part of one new program, governed by certain federal rules. But people did not forget the original vision—and there was alarm as ADC benefits flowed to people who did not fit the image of respectable, down-on-their-luck white women.

ADC’s image problem increased over time, as other New Deal programs expanded in ways that captured more and more of those conventionally deserving mothers. This, along with other demographic factors, caused the program to become larger and the percentage of non-white recipients to rise. Meanwhile, African Americans were demanding more from the polity than ever before and white Americans were coming to see themselves as “taxpayers,” entitled to concern themselves with all so-called “social” spending. Together, these factors fueled animosity toward ADC and the Black, unmarried, women who had become its public face.<sup>31</sup> Notably, anti-welfare politics were popular across the United States and not just in the parts of the country that are generally understood to be more conservative or racist. In New York, for example, in 1947, the *Times* raised the alarm about a “woman in mink” illegitimately living on the dole—prompting critic A.J. Liebling to characterize the now-familiar phrase “welfare reform” as but a euphemism for cuts in public aid.<sup>32</sup>

<sup>29</sup> For a brisk review of the history of ADC and its challenges, see FELICIA KORNBLUH & GWENDOLYN MINK, ENSURING POVERTY: WELFARE REFORM IN FEMINIST PERSPECTIVE 21-41 (2018).

<sup>30</sup> On the relationship between mothers’ pensions and Aid to Dependent Children (later Aid to Families with Dependent Children), see generally LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935 (1994).

<sup>31</sup> MOLLY MICHELMORE, TAX AND SPEND: THE WELFARE STATE, TAX POLITICS, AND THE LIMITS OF AMERICAN LIBERALISM (2012); JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM 1945-1965 (2005); ELLEN REESE, BACKLASH AGAINST WELFARE MOTHERS: PAST AND PRESENT (1st ed. 2005).

<sup>32</sup> A.J. Liebling, *Horsefeathers Swathed in Mink*, NEW YORKER, Nov. 22, 1947, at 66, reprinted in WELFARE: A DOCUMENTARY HISTORY OF U.S. POLICY AND

In line with Liebling's insight, many state legislatures "reformed" ADC in ways that made it harder to get and harder to keep. Some states, for example, imposed what we now call work requirements—conditioning the mother's benefits on her acceptance of low-wage work. Another state tactic was to condition assistance on a woman's willingness to file criminal non-support charges against the children's father.<sup>33</sup> The situation that became a pivot point in Elizabeth Wickenden's career occurred in Louisiana: drawing on a technique pioneered in neighboring Mississippi, Louisiana amended its state ADC law to prohibit payments to any woman who had a child out of wedlock after receiving a check from the welfare department, until she presented proof that she had "ceased illicit relationships" and was "maintaining a suitable home for the child." A law enacted in the same legislative session denied benefits to a so-called illegitimate child if the mother of that child had two or more older illegitimate children. When the state attorney general deemed these laws to have retroactive effect, some 22,500 children lost their benefits—the vast majority African American. Community groups and local civil rights organizations quickly mobilized, and soon the situation garnered national attention, including from Elizabeth Wickenden, Justine Wise Polier, and the American Jewish Committee's leading civil rights maven, Shad Polier.<sup>34</sup>

Some of Louisiana's critics went on media campaigns. Others lobbied President Eisenhower. Wickenden, the Poliers, and their allies focused on the U.S. Department of Health, Education, and Welfare ("H.E.W."), an agency that, in its predecessor form (the Federal

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POLITICS, 125 (Gwendolyn Mink & Rickie Solinger eds., 2003). For more on this episode, see TANI, *supra* note 27, at 178-80.

<sup>33</sup> See generally REESE, *supra* note 31.

<sup>34</sup> This paragraph draws generally on a wealth of published sources. The most exhaustive account of "suitable home" policies remains WINIFRED BELL, *AID TO DEPENDENT CHILDREN* (1965). For additional secondary accounts on the Louisiana episode, see Lisa Levenstein, *From Innocent Children to Unwanted Migrants and Unwed Moms: Two Chapters in the Public Discourse on Welfare in the United States, 1960-1961*, 11 J. WOMEN'S HIST. 10 (2000); Taryn Lindhorst & Leslie Leighninger, "Ending Welfare as We Know It" in 1960: Louisiana's Suitable Home Law, 77 SOC. SERV. REV. 564 (2003). As these authors emphasize, the laws in question were part of a broader effort to countermand federal integration orders and retaliate against Black Louisianans who demanded their civil rights. Levenstein, *supra*, at 15; Lindhorst & Leighninger, *supra*, at 568; see also Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399 (1997).

Security Agency), had housed some of Wickenden's closest allies in the federal bureaucracy. The agency was a useful target because it had statutory authority to cut off Louisiana's federal welfare funds—some \$22 million dollars—for failure to comply with federal rules.<sup>35</sup>

In practice, funding cut-offs were rare. It was the “nuclear option,” in the words of one former H.E.W. employee.<sup>36</sup> But the situation was serious enough that eventually H.E.W. convened a formal hearing on whether Louisiana had violated the conditions of its federal grant-in-aid. In connection with that hearing, the agency accepted “friend-of-the-court”-type briefs from four groups: the American Civil Liberties Union, the Child Welfare League of America, the National Urban League, and the Family Services Association. Shad Polier wrote the brief for the Child Welfare League. And behind the scenes, Wickenden quarterbacked—networking among the key players, helping them pool knowledge and resources.<sup>37</sup>

The resolution of the Louisiana episode is a longer story.<sup>38</sup> What matters for this essay is that it sparked something in Elizabeth Wickenden: a realization that the best way to achieve her reformist goals might not be through policymaking channels, as she had so often pursued, but through legal process and claims about legal rights.<sup>39</sup> Thereafter, Wickenden made herself a clearinghouse of sorts for reports about state and local infringements on the rights of welfare recipients, as well as for reports—still scattered in the early 1960s—of welfare recipients fighting back in court. And because of her long career in social welfare, she was a magnet for information. Though not trained as a lawyer, she also started to pay greater attention to the ways in which new state and federal social welfare legislation might infringe on individual legal rights.<sup>40</sup>

It was in the course of testing her ideas that Wickenden began reaching out to Reich, whom she knew through Polier. Indeed, he

<sup>35</sup> TANI, *supra* note 27, at 216-17.

<sup>36</sup> Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 856 (2015).

<sup>37</sup> TANI, *supra* note 27, at 217-20.

<sup>38</sup> For an account of how H.E.W. resolved the incident, see *id.* at 220-22. On how state officials subsequently circumvented H.E.W.'s disapproval of “suitable home”-type policies, see Alison Lefkowitz, *Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961-1972*, 20 J. HIST. OF SEX. 594 (2011).

<sup>39</sup> TANI, *supra* note 27, at 222.

<sup>40</sup> *Id.* at 236-38, 242-43, 247-51.

became her “court of last resort on welfare law issues,” as she would jokingly tell him in October 1964.<sup>41</sup> One early example of their correspondence is Reich’s August 30, 1962, letter to Wickenden, thanking her for sending him thoughts on the Public Welfare Amendments of 1962.<sup>42</sup> Although not well remembered today, these amendments were sold to the public (by the Kennedy Administration) as a sweeping revision of the nation’s public welfare program—one that would rehabilitate people rather than merely keep them alive.<sup>43</sup> Wickenden, however, saw illiberal elements in this ostensibly liberal reform. Following the Louisiana suitable home battle, she was particularly concerned about language giving states freer rein over recipients who allegedly mismanaged their welfare payments—for example, by failing to spend those payments “in the best interest of the child.”<sup>44</sup> In such cases, the 1962 law clarified, states were entitled to impose “counseling and guidance” on the offending mother, and even civil and criminal penalties.<sup>45</sup> Reich’s response to Wickenden affirmed her concerns—and added that if a welfare recipient were prosecuted for the vague “crime” of not spending her money properly, such a prosecution might even violate the Due Process clause of the U.S. Constitution.<sup>46</sup>

Recall that Reich at this point in his career was not yet writing about the plight of welfare recipients. Although deeply concerned about the relationship between the state and the individual, Reich drew his main examples from different spheres. In August of 1962, when he had this exchange with Wickenden about public welfare law, the as-yet untenured Reich had just published his *California Law Review* piece on *The Public and the Nation’s Forests* (a meditation on who ought to make decisions about the nation’s publicly owned

<sup>41</sup> Letter from Elizabeth Wickenden to Charles A. Reich (Oct. 13, 1964) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 7, Folder 1).

<sup>42</sup> Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 172 (1962).

<sup>43</sup> TANI, *supra* note 27, at 228-29. For an explanation of why the notion of “rehabilitation” appealed to liberals at this juncture, see MITTELSTADT, *supra* note 31.

<sup>44</sup> National Social Welfare Assembly, *Confidential Draft NSWA Statement on the Public Welfare Amendments of 1962*, Memo #2: *The Issue of the Civil Rights of Assistance Recipients* (Aug. 17, 1962) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Box 1, Folder 21).

<sup>45</sup> *Id.*

<sup>46</sup> Letter from Charles A. Reich to Elizabeth Wickenden (Aug. 30, 1962) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 1, Folder 21).

forests)<sup>47</sup> and was likely working on his *Harvard Law Review* essay on Justice Black.<sup>48</sup>

Wickenden corresponded with Reich again in early 1963 regarding a memo she had written titled “Poverty and the Law.”<sup>49</sup> That memo—to which he gave his stamp of approval<sup>50</sup>—synthesized much of the information she had gathered about infringements on recipients’ statutory and constitutional rights. It described mothers in New Jersey whose applications for welfare triggered rarely enforced adultery and fornication laws; a mother in Connecticut who was sent back to her home state in the South after seeking welfare for a supposedly illegitimate child; and, in many jurisdictions, local authorities making night raids on the homes of welfare recipients to search for a “man in the house”—that is, a male figure who was enjoying sexual access to a woman while allegedly off-loading his financial responsibilities to her onto the state.<sup>51</sup>

The goal of the memo, Wickenden wrote, was to encourage lawyers and other interested parties to consider attacking these practices in court.<sup>52</sup> But she had another target, too: federal agency officials. She wanted her friends in H.E.W. to understand the legal and constitutional problems with these practices and to use their leverage—that is, the power of the purse—to pressure offending state and local governments.<sup>53</sup>

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<sup>47</sup> Charles A. Reich, *The Public and the Nation’s Forests*, 50 CAL. L. REV. 381 (1962).

<sup>48</sup> See Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

<sup>49</sup> Elizabeth Wickenden, “Poverty and the Law: The Constitutional Rights of Assistance Recipients” (1963) (on file with the Social Welfare History Archives, Univ. of Minnesota, Mpls., Minn., National Social Work Council, National Social Welfare Assembly, and National Human Services Assembly Records, sw004, Series 2).

<sup>50</sup> Letter from Charles A. Reich to Elizabeth Wickenden (Mar. 4, 1963) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 2).

<sup>51</sup> Wickenden, *supra* note 49.

<sup>52</sup> *Id.*

<sup>53</sup> She corresponded with multiple H.E.W. administrators about the memo (and received warm acknowledgments). See, e.g., Letter from Alanson Willcox to Elizabeth Wickenden (Mar. 5, 1963) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 2, Folder 7); Letter from Ellen Winston to Elizabeth Wickenden (Mar. 7, 1963) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 2, Folder 7); Letter from Jules Berman to Elizabeth Wickenden (Mar. 11,

Both of these targets are apparent in the next request that she and the Poliers made of Reich, within days of circulating “Poverty and the Law”: they asked him to write a memorandum on that “midnight raids” issue, in which he would provide the kind of legal and constitutional analysis that was beyond Wickenden’s expertise.<sup>54</sup> For Reich’s troubles, they secured an honorarium from the Field Foundation (where Justine Wise Polier, a former Board member, had influence).<sup>55</sup> But it seems doubtful that he did it for the money. The issue of midnight raids implicated features of modern American governance that had long troubled him: the way that a seemingly beneficent and protective state could imperil the very freedoms it was supposed to secure, and the way that state actors pioneered technologies of coercion on the most vulnerable citizens.

The result of this assignment was the document *Midnight Welfare Searches and the Social Security Act*, which Reich wrote first as a memo and then published as a short article in the *Yale Law Journal*.<sup>56</sup> Within months, Wickenden and her allies had distributed over 2,500 reprints of the article—including to federal and state welfare commissioners—and succeeded in having it included in the Congressional Record.<sup>57</sup>

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1963) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 2, Folder 7).

<sup>54</sup> Letter from Shad Polier to Elizabeth Wickenden (Mar. 26, 1963) (on file with the Wisconsin Historical Society, Madison, Wis., Elizabeth Wickenden Papers, Mss 800, Box 2, Folder 7); DAVIS, *supra* note 9, at 84; FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* 30 (2007).

<sup>55</sup> The honorarium was \$500, or a little over \$4000 in 2020 dollars. DAVIS, *supra* note 9, at 84; *see also* Jennifer Mittelstadt, *Philanthropy, Feminism, and Left Liberalism, 1960–1985*, 20 J. WOMEN’S HIST. 105 (2008) (discussing the Field Foundation’s support for projects at the intersection of child welfare, civil rights, and poverty policy).

<sup>56</sup> Reich, *Midnight Welfare Searches*, *supra* note 3; *see also* Charles A. Reich, *Searching Homes of Public Assistance Recipients: The Issues Under the Social Security Act*, 37 SOC. SERV. REV. 328 (1963) (conveying the same information to a professional social work audience).

<sup>57</sup> Draft “memorandum relating to developments in the area of extending legal services to welfare recipients” from Elizabeth Wickenden to Charles Reich (Sept. 25, 1963) (on file with the Social Welfare History Archives, Univ. of Minnesota, Mpls., Minn., National Social Work Council, National Social Welfare Assembly, and National Human Services Assembly Records, sw004, Series 2). For a sense of the specific individuals and groups that received the memo, see the materials on file



The rest of the story is more familiar. Building on his “midnight searches” research and his own observations of the coercive side of state power, Reich would go on to write the most important article of his career, *The New Property*.<sup>58</sup> The article married the plight of welfare recipients to the condition of all Americans who relied on government largesse, whether for a professional license, a job, or a travel document. Reich then suggested how a basic change in the constitutional conceptualization of public benefits—from gratuity to property—could restore individual liberty.<sup>59</sup> Along the way, he also exposed the great myth that underlay so much American ideology, of “self-made” people. By exploring the many ways that property was created by government action, he showed that those we refer to as “welfare recipients” are no more dependent upon governmental “handouts” than are people whose homes are on former Indian lands, or companies that hold broadcast licenses from the Federal Communications Commission, or scientists at work on research in government labs (or members of the public who benefit economically from the fruits of that research).<sup>60</sup> Many readers left the article with a vision of a better society—at once more equal and more free—and the notion that a change in constitutional interpretation might lead the way.

Charles Reich’s hope may have been misplaced. But the hope is the important part. Reich and like-minded theorists helped inspire a generation of self-identified “poverty lawyers,” who anchored their practices in economically disadvantaged communities and tried to make law work for poor people rather than against them. Reich also inspired legions of scholars. By the end of the twentieth century, *The New Property* was among the most-cited law review articles of all time.<sup>61</sup> In 2002, when one of us interviewed him, he admitted to

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in the Elizabeth Wickenden Papers at the Wisconsin Historical Society, Madison, Wis. (Mss 800, Box 2, Folder 1).

<sup>58</sup> Reich, *supra* note 1. Reich referenced neither Wickenden nor Polier in this article, but Reich prominently thanked Wickenden in a subsequent publication. See Reich, *Individual Rights and Social Welfare*, *supra* note 3, at 1245 (noting Wickenden’s “invaluable help both on the general philosophy of [the] article and on its discussion of specific issues”).

<sup>59</sup> Reich, *supra* note 1.

<sup>60</sup> Haris A. Durrani, Orchestra[ting] Free Space: Law, Technology, and Empire in Cold War America (2020), (unpublished paper) (on file with Felicia Kornbluh).

<sup>61</sup> Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996); see also Fred R. Shapiro & Michelle Pearse, *The Most-Cited*

thinking that his work had become more of a foil for people who disagreed with him than an inspiration for liberals who believed in both liberty and equality. But still, he held out hope “that in the long run it might come round to my point of view and it might happen fast . . . in the twinkling of an eye. So I don’t ever despair.”<sup>62</sup>

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Like Reich, Justine Wise Polier and Elizabeth Wickenden never gave up on their visions of a better society, even as they witnessed public policy veering further away. This memorial to Reich is in some sense a memorial to their lives and labors, less remembered than Reich’s but both foundational to his thinking.

By centering these women, however, we do not aim to diminish Reich’s own accomplishments. To the contrary, we hope we are commemorating him in a way he would appreciate. Loneliness was a prominent theme in Reich’s personal writings—a yearning for fellowship; a sadness at its elusiveness. “Sometimes,” he wrote in the final pages of *The Sorcerer of Bolinas Reef*, “I fear I will never have lasting ties to other people.”<sup>63</sup> But behind Reich’s greatest work, we argue, was connection. Also friendship and solidarity, across generations, and gender, and disciplinary lines. We honor his individual spirit when we remember what bound him to others.

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*Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (placing *The New Property* number seven on the list). In 2020, the article continues to inspire. See, e.g., Andrew Hammond, *The Old New Property*, 114 NW. U. L. REV. (forthcoming 2020) (drawing on insights from litigation over Medicaid and Supplemental Nutrition Assistance Program benefits to “sharpen[] and update[] Charles Reich’s theory of government benefits in *The New Property*”).

<sup>62</sup> Interview by Felicia Kornbluh with Charles A. Reich, *supra* note 5.

<sup>63</sup> REICH, *supra* note 5, at 256.